

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

CAPITAL SCHOOL DISTRICT, :
 Petitioner, :
 :
 :
v. :
 :
 :
CAPITAL SUPPORT ASSOCIATION, :
DSEA / NEA, :
 Respondent. :

Representation Petition
90-10-055

ORDER OF DISMISSAL

The Capital School District (hereinafter "District" or "Petitioner") is a public employer within the meaning of section 4002 (n) of the Public School Employment Relations Act, 14 Del. C. Chapter 40 (Supp. 1990 (hereinafter "ACT")). The Capital Support Association, DSEA / NEA (hereinafter "Association" or "Respondent") is the exclusive bargaining representative of the public employer's custodians, custodian firemen, Chief I Custodians, Chief II Custodians and maintenance employees within the meaning of 14 Del. C., section 4002 (1), of the Act.

On October 22, 1990, the District filed a representation petition with the Delaware Public Employment Relations Board (hereinafter "PERB" or "Board") requesting an amendment of certification and/or a unit clarification of the custodial/ maintenance bargaining unit for which AFSCME was initially certified as the

exclusive bargaining representative in 1971 by the Governor's Council, Department of Labor under Title 19, chapter 13. [1] The District's petition seeks to remove from the unit the positions of: (1) Chief Custodian I; (2) Chief Custodian II; (3) Maintenance Supervisor; and (4) Night Supervisor for the reason that they are "supervisory employees" within the meaning of section 4002 (q), of the Act.

The Association's Answer, filed on or about November 15, 1990, disputes the District's petition on several grounds. Initially, the Association claims the petition was not timely filed within the 180 to 120 day period immediately preceeding the expiration of the current collective bargaining agreement, as required by section 4010 (f), of the Act.

On January 23, 1991, the District refiled its petition. Because the current collective bargaining agreement expires on June 30, 1991, the refiling is within the statutory period set forth in section 4010 (f). [2]

By letter dated January 31, 1991, the Association advised the PERB that its original answer of November 14, 1991, adequately responded to the District's resubmitted petition. The District filed no responsive pleading.

[1] Prior to the Amending of the Public School Employment Relations Act in July, 1990, the bargaining rights of the custodial and maintenance employees of Delaware's public school districts were governed by 19 Del. C. Chapter 13, administered by the Governor's Council on Labor, Department of Labor.

[2] The parties agree that timeliness is no longer in issue.

Consideration of the substantive issue was deferred pending a disposition of the Association's preliminary objections. The parties were afforded the opportunity to submit briefs supporting their respective positions. The purpose of this interim decision is to determine if the Petitioner is entitled to a consideration of the merits of the underlying issue of supervisory status.

PRINCIPAL POSITIONS OF THE PARTIES

Association: The Association argues that a Petition to Amend Certification is intended for situations where current conditions surrounding a previously certified bargaining unit have made the unit inappropriate. It cites the geographical separation of divisions, dramatic growth or shrinkage of the bargaining unit or loss of a community of interests as examples of the type of conditions justifying an amendment of certification. The Association maintains that the District's internal allocation of supervisory duties is not the type of condition which justifies or supports an amendment of certification. Because the District has alleged no other facts supporting the petition, the Association argues that the petition should be dismissed as improper in so far as it relates to amending the existing certification.

The Respondent claims that a Petition for Unit Clarification is intended to clarify whether an existing certification of an exclusive bargaining representative is applicable to specific employees or groups of employees within the bargaining unit and is, therefore, the more appropriate procedure for resolving this matter. The Association contends that unit clarification proceedings require a showing that the

essential duties of the disputed positions have changed so as to make their inclusion in the bargaining unit no longer appropriate or possible.

While acknowledging that the application of res judicata to administrative proceedings has not received universal acceptance, the Association argues that the principle should be adopted by the PERB to bar the petition and dispose of the matter. Alternatively, the Association argues that if it is determined that the doctrine of res judicata does not apply and resolve this matter, the proof must necessarily be limited to changes in essential job duties occurring since May of 1988, when the Governor's Council on Labor recertified the unit as appropriate, including the positions which the District now seeks to exclude as inappropriate.

Lastly, the Respondent argues that the plain meaning of the language of Title 14 must prevail. It argues that because Title 14, Chapter 40 contains no provision for the cancellation of prior certifications, the legislature's silence indicates a legislative intent that "many decisions of the Council would not become void by operation of the law".

DISTRICT: The District, argues that the statutory framework of Title 14, Chapter 40 is significantly broader than that of Title 19, Chapter 13. Under Title 19, the Department of Labor, through the Governor's Council on Labor, is responsible for the determination and certification of appropriate bargaining units. Under Title 14, it is the PERB which has this responsibility in addition to resolving unfair labor practices and administering the statutory impasse resolution

procedures. Also, the factors to be considered in determining what constitutes an appropriate unit are broader under Title 14 than under Title 19.

The District also argues that when the Association voluntarily opted to remove itself from coverage under Title 19 to be governed by the provisions of Title 14, it became bound by all of the provisions contained therein, including the requirement to have unit determination questions resolved exclusively by the PERB.

Like the Association, the Petitioner argues that the plain meaning of the statutory language must prevail. The District, however, maintains that the statutory language clearly establishes that the legislature recognized that units electing coverage under Title 14 may have been previously certified under another statute by a different administrative body. The District contends that the legislature addressed this precise situation by expressly providing that prior unit determinations would continue undisturbed until a party properly raised a unit question under Title 14. The District cites 14 Del. C. sections 4010 (f) and 4018, arguing that in the Matter of Unit Clarification Petition of Fraternal Order of Police, Lodge No. 5, Representation Petition No. 86-12-008 (1987), the plain meaning of sections 4010 (f) and 4018 was interpreted by the PERB to mean "that the Council's 'prior certifications under Title 19, Chapter 13 are controlling only until properly contested under the provisions of Section 1610 (f)'"... [3]

[3] Section 1610 (f) of the Police and Firefighters Employment Relations Act, 19 Del. C. Chapter 16 (1986) is the same as Section 1410 (f) of the Public School Employment Relations Act.

The District also argues that it has a statutory right to an initial unit determination by the PERB, regardless of any change in circumstances.

Concerning the application of res judicata, the District contends that the doctrine has been misapplied by the Association and has no bearing in this matter, for the following reasons: (1) there has been no prior decision by the PERB involving supervisory status; (2) there has been no prior final adjudication of the issue since unit determinations by the Governor's Council under Title 19 are not entitled to judicial review; (3) there is no identity of issue since a unit clarification petition was never filed with nor addressed by the Governor's Council. The District maintains that res judicata clearly does not apply where, as here, different standards or criteria are considered and applied by two separate and distinct administrative bodies each chartered under a different statute.

Finally, the District contends that because the Rules and Regulations of the Governor's Council expressly provide that its decisions are not considered binding even as to its own subsequent determinations, it would be inconsistent and illogical to consider them binding on the PERB when addressing a similar issue arising under Title 14. [4]

[4] Section 2.7, paragraph 3, of the Regulations Under Title 19, Chapter 13, Del. C. provides, in relevant part: "Although past decisions may be considered, the Governor's Council on Labor will not be bound by those decisions."

ISSUES

1. Whether the District's petition requesting the deletion of several positions from the current bargaining unit of custodial and maintenance employees for the reason that they qualify as supervisory employees as defined in Section 4002 (q) of the Act, is properly filed in compliance with the requirements of the Act?

2. If it is determined that the petition is properly filed, does the decision by the Governor's Council bind the parties, in accord with the principle of res judicata, and resolve this matter?

OPINION

At the time this matter arose, and continuing to the present, there has evolved relatively little case law applying the provisions of the Public School Employment Relations Act to questions concerning representation. This is because prior to 1990, coverage of Title 14 was limited to the certificated professional employees of the state's public school districts. This group of employees was already extensively organized when the Public School Employment Relations Act was initially enacted in 1982. The issue(s) presented here, therefore, are questions of first impression.

Subsequent to the enactment of Title 14, as amended in July, 1990, to include school support personnel, the bargaining unit of custodial and maintenance employees voluntarily exercised the available option to remove itself from Title 19, Chapter 13, administered by the Governor's Council of the Department of Labor and to be governed by the provisions of Title 14, Chapter 40, administered by the Public Employment Relations Board. 14 Del. C. section 4002 (m). It is,

therefore, Title 14, Chapter 40, which controls this matter.

Unlike Capital School District v Capital Educational Secretaries Assoc., (Rep. Pet. No. 90 - 10- 056) where the issue was one of eligibility of confidential employees to be included in any bargaining unit, the District's petition in this matter raises the more limited question of whether the disputed positions are supervisory within the definition of Section 4002 (q), of the Act and, therefore, inappropriate for inclusion in the existing unit of which they are currently a part.

The representation petition filed by the District contains the following section: "IF DELETING POSITION(S): Explain the changes in circumstances which warrant a modification in the unit composition:"

The change relied upon, as set forth by the District is:

Modification of the bargaining unit is warranted because the classifications the Capital School District seeks to exclude from the bargaining are comprised of "supervisory employees" within the meaning of section 4002 (p) of 14 Del. C. Chapter 40. At the election of the union, 14 Del. C. Chapter 40, rather than 19 Del. C. Chapter 13, now governs this bargaining unit and this unit has never been designated as, or held to be, an appropriate unit under 14 Del. C. Chapter 40. [5]

[5] Section 4002 (p) referenced by the District in this section of the petition is correctly section 4002 (q), and will be referred to as ...

The petition contains no allegation that there has been a substantial modification in the nature of the duties and working conditions of existing positions or is that new positions were created subsequent to the 1988 determination by the Governor's Council. The Petitioner seeks to have the designated positions removed from the bargaining solely because they are "supervisory" as defined by section 4002 (q) of the amended Title 14.

The District contends that the Legislature clearly authorized the PERB to revise prior unit determinations made by other bodies under other statutes and addressed the resulting practical problems by providing in two separate statutory provisions a transitional phase under which the prior unit determination would continue until a party raised a question concerning representation under Title 14. In support of its position, the District relies on Sections 4018 and 4010 (f).

14 Del. C., Section 4018, provides:

Any employee organization that has been certified as the exclusive representative of a bargaining unit deemed to be appropriate prior to the effective date of this chapter shall so continue without the requirement of an election and certification until such time as a question concerning representation is appropriately raised under this chapter in accordance with section 4011 (b) of this

[5] continued...

...4002 (q) throughout the balance of this decision.

title, or until the Board would find the unit not to be appropriate in accordance with section 4010 (f) of this Title [6]

Section 4018 evidences a clear legislative intent that a bargaining unit which has been determined to be appropriate prior to the effective date of the Act shall so continue until such time as the Board would find the unit no longer appropriate under Section 4010 (f). Section 4010 (f) provides, in relevant part:

Any bargaining unit determined to be appropriate prior to the effective date of this chapter, for which an exclusive representative has been certified, shall so continue without the requirement of a review and possible redesignation until such time as a question concerning appropriateness is properly raised under this chapter. The appropriateness of a unit may be challenged by the public school employer, 30% of the members of the unit, an employee organization or the Board not more than 180 days nor less than 120 days prior to the expiration of any collective bargaining agreement in effect on the effective date of this chapter.
(emphasis added) [7]

[6] There is no question involving decertification and section 4011 (b) is not, therefore, at issue in this matter.

[7] The parties agree that when the District refiled its petition in January, 1991, it became timely for the purpose of section 4018 (f).

The District's position that previously certified units must be reviewed by the PERB upon request by either party ignores the statutory requirement that questions concerning representation conform to the requirements of Section 4010 (f).

It is an accepted principle of statutory construction that statutory provisions should not be considered in isolation, but rather construed together with and in the context of other provisions in order to provide, wherever possible, a consistent and logical meaning not only to the individual sections, but to the document when read as a whole.

Consistent with this principle, other provisions of the PSERA which directly bear on the question of appropriateness cannot be ignored. Section 4006, Public Employment Relations Board, confers upon the PERB a general grant of authority to develop rules and regulations necessary to assure the orderly and efficient administration of the Act. It provides at paragraph (h):

"To accomplish the objectives and to carry out the duties prescribed in this chapter, the Board shall have the following powers:

(1) To issue amend and rescind such rules and regulations as it deems necessary to carry out this chapter and to prevent any persons from engaging in conduct in violation of this chapter. Such rules and regulations shall be adopted in accordance with Chapter 101 of Title 29".

More specifically, Section 4010, Bargaining Unit

Determination, directs that:

(e) "Procedures for redefining or modifying a unit shall be set forth in the rules and procedures established by the Board".

Pursuant thereto, Article 3, Representation Proceedings, of the Board's Rules and Regulations, provides at paragraph 3.4 (8):

Modification of a Bargaining Unit:

In the event that there is a substantial modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created or there is some other compelling reason for the Board to consider modifying the designated bargaining unit, the public employer or the bargaining representative may file a petition with the Board which shall include the following: (a) the name of the employer; (b) the name of the exclusive representative; (c) a description of the bargaining unit; (d) a brief statement explaining the reasons for a modification of the bargaining unit.

The District has alleged neither the creation of a new classification nor a substantial modification in the nature of the duties and working conditions of the existing positions. The issue, therefore, is whether the passage of the amended Act, in and of itself, constitutes a compelling reason for the PERB to consider modifying

the present bargaining unit for the reasons raised by the District in its petition. I conclude that it does not.

The District's argument fails to consider that Section 4010 (f), authorizes that questions concerning appropriateness may "properly be raised under this chapter", not merely in accord with section 4010 (f). The petition must, therefore, also conform to rules properly promulgated by the Board pursuant to Sections 4006 (h) and 4010 (e), of the Act.

Section 4010 Bargaining Unit Determination, provides at subsection (d), in relevant part:

"... The Board or its designee shall separate supervisory and nonsupervisory employees into separate appropriate bargaining units for all units created subsequent to July 8, 1990."

Had the legislature intended for supervisors and nonsupervisory employees to be considered inappropriate in all bargaining units, including those determined to be appropriate prior to July 18, 1990, by operation of law alone, it was incumbent upon it to so provide. To the contrary, it imposed the restriction only upon those bargaining units created subsequent to July 18, 1990. To require the PERB to reconsider all units, which include both supervisory and nonsupervisory employees, upon the request of either party solely on the basis of the amended statute would contravene the express intention of the legislature and constitute an improper usurpation of legislative authority.

The requirement of Rule 3.4 (8), that a "compelling circumstance" be present is not unreasonable. To the contrary, it is consistent with both the underlying intent of the legislature, as

evidenced by the language of section 4010 (d), and with the practical considerations limiting the feasibility of PERB's ability to review every unit certified prior to the enactment of the amended Act whenever a question of supervisory status is raised.

Based upon the language of section 4010 (d) and (f), the rule-making authority granted both generally and specifically by sections 4006 (h) and 4010 (e), respectively, and Rule 3.4 (8), it is apparent that the legislature did not intend for the mere enactment of the amended statute to create an automatic right for unit review by the PERB based upon a question of supervisory status. Nor does the statute, itself, qualify as a compelling reason for the Board to consider modifying the existing bargaining unit, as provided for in Rule 3.4 (8).

CONCLUSION

For the reasons set forth above, the District's petition for amendment of certification and/or unit clarification of the existing bargaining unit of custodial and maintenance employees does not comply with the requirements of the Act. It is therefore, unnecessary to

address the applicability of either res judicata or the absence of alleged changes in job responsibilities.

Based on the foregoing discussion, the petition is hereby dismissed.

IT IS SO ORDERED.

Charles D. Long, Jr.

Charles D. Long, Jr.

Executive Director, PERB

D. Murray-Sheppard

Deborah Murray Sheppard

Principal Assistant, PERB

8 May 1991

(Date)

